INDEX

565856—43——1

CITATIONS

Cases:

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 75

THE UNITED STATES, PETITIONER

v.

ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. I, 76–92)[1] is reported in 99 C. Cls. 71.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1942 (R. I, 92). A motion for a new trial was overruled on March 1, 1943 (R. I, 93). The petition for a writ of certiorari

[1] The record is in two volumes, with certain additional matter presented by stipulation in the Appendix to this brief. In the record references the roman numeral refers to the volume, the arabic to the page.

was filed May 29, 1943, and granted October 11, 1943 (R. II, 766). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether under the standard form of Government construction contract the Government is liable in damages for delay to the building contractor who completed performance within the 420 days specified by his contract but who might have finished 106 days sooner had it not been for the Government's failure to terminate earlier than it did a related mechanical contract, which in fact was completed by the successor mechanical contractor within the original contract period.

2. Whether a contractor may recover from the United States damages found by the Court of Claims to have resulted from the arbitrary and capricious acts and instructions of the Government representatives at the site of the work, either where no ruling thereon was obtained from the contracting officer, or where no appeal was taken from the ruling of the contracting officer to the head of the department or his representative as required by Article 15 of the standard form contract.

3. Whether a contractor can recover the excess cost of labor and materials furnished for work not required under the contract when no written order therefor was received from the Government

contracting officer or head of the department, as required by Articles 3 and 5 of the standard form Government construction contract.

4. Whether general office overhead expenses may be included as an item of damages for delay caused by the Government, in the absence of a finding that such expenses were increased as a result of the delay.

5. Whether the claim of a subcontractor for damages caused by acts of the Government is recoverable in a suit by the contractor, in the absence of a finding that the contractor was legally obligated to reimburse the subcontractor for such damages.

6. Whether there is substantial evidence to support the findings below that the acts and rulings of the Government's officers and representatives, which were the basis for the recovery allowed, were unreasonable, arbitrary and capricious, and so grossly erroneous as to imply bad faith.

CONTRACT PROVISIONS INVOLVED

The provisions of the Government contract here involved are set out in Appendix A, pp. 82–87, *infra*.

STATEMENT

The following facts were found by the Court of Claims:

Respondent, Algernon Blair, pursuant to a bid, entered into a contract with the United States (the "building contract") to construct cer-

tain buildings at the Veterans' Administration Facility, Roanoke, Virginia, for a total consideration of $1,228,423.68 (R. I, 32–33). Both the bid and the contract stated that "performance will begin within ten (10) calendar days after date of receipt of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to proceed" (R. I, 32). Notice to proceed was received by respondent on December 21, 1933, thereby fixing February 14, 1935, as the date for completion of all the work called for by the contract (R. I, 34). Concurrently with the building contract, C. J. Redmon, trading as Redmon Heating Company, pursuant to a bid, also entered into a contract with the United States (the "mechanical contract") for the performance of all plumbing, heating, and electrical work required or necessary to be installed in the buildings to be constructed by respondent (R. I, 35). Notice to proceed was received by Redmon on or about December 21, 1933 (R. I, 35). Redmon's bid and contract provided that his work was to be commenced promptly after receipt of notice to proceed, and was to be completed at a date not later than that provided in the contract for the general construction (R. I, 35). The terms and conditions of both contracts were identical and differed only in the description of the work to be performed (Exs. 2 and 13).[2]

[2] These exhibits, which have not been printed, are part of the certified record on file with the clerk.

Respondent proceeded with the construction of the project under the building contract and completed it within the contract time (R. I, 78). Redmon commenced the performance of the mechanical contract, but owing to his inability to proceed satisfactorily, his right to proceed was terminated by the Government on June 26, 1934 (R. I, 41). Thereafter the Virginia Engineering Company undertook to complete the mechanical contract on behalf of the surety on Redmon's bond (R. I, 41), and succeeded in completing the contract by February 14, 1935, the contract date (R. I, 43).

Respondent filed a claim with the Veterans' Administration for certain expenses which he contended were caused by the delay of the mechanical contractor and for other items of expense which he alleged were unnecessarily imposed upon him by the arbitrary, capricious, and unfair conduct of the Government's representatives at the site of the work. After rejection of his claim by the Veterans' Administration, respondent brought suit in the Court of Claims. That court entered judgment for respondent for $130,911.08 (R. I, 92). The court's specific findings in respect of each item of claim are substantially as follows:

1. *Delay* (R. I, 34–44).—Respondent planned to complete all the work called for by his contract within 314 calendar days instead of the 420 calendar days allowed by the contract, in other

565856—43——2

words, by November 1, 1934, instead of February 14, 1935. On January 24, 1934 (after both contracts had been executed and notice to proceed given under each), respondent advised Redmon, the mechanical contractor, that he hoped to have all buildings completed by November 1, 1934. On March 30, 1934, the Government was also so notified, and it and Redmon were given respondent's progress schedule. (R. I, 37.) Respondent commenced work promptly after receipt of notice to proceed, diligently carried it on and at no time was responsible for any delays (R. I, 34, 35). However, no representative of Redmon reported at the site of the work until March 19, 1934, when Redmon's superintendent arrived, after many urgent demands from the contracting officer (R. I, 36, 40–41). The contracting officer, upon protests by respondent that Redmon was delaying the work, wrote to Redmon from time to time urging him diligently to prosecute the work and advising him that the progress of the construction work was being delayed because of his failure properly to proceed (R. I, 40). Between the date he was given notice to proceed and June 26, 1934, Redmon did not at any time have adequate equipment or men on the job properly to carry on the work called for by his contract (R. I, 36, 41), nor was he financially able during this period to complete his work (R. I, 36). Reasonable inquiry by the Government would have disclosed these facts, but

no such inquiry was made due to false statements and reports made to the contracting officer by the Government's agents in charge of the work at the site (R. I, 36).[4]

On June 26, 1934, Redmon advised the contracting officer that he was unable to proceed with his contract, and the Maryland Casualty Company, surety on Redmon's performance bond, thereupon undertook to carry on some of the work. It made unsatisfactory progress, however, and on July 16, 1934, entered into a contract with the Virginia Engineering Company to take over Redmon's unfinished work. (R. I, 41.) That company made every effort to overcome the delay which Redmon had caused, with the result that respondent was able to finish performance of the contract by the required date, February 14, 1935 (R. I, 43). Respondent would have completed all of his outside work in early September 1934 had it not been for Redmon's delay; the delay compelled him to do most of the outside work

[4] There is no finding that respondent took any appeal to the head of the department from the contracting officer's refusal to terminate Redmon's right to proceed prior to June 26, 1934. Article 15 of the contract (Appendix A, *infra*, pp. 81–86) provides that all "disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions."

between November 1934 and February 1935 when weather conditions made such work much more expensive (R. I, 41–42). Respondent also was delayed and put to increased expenses by Redmon's failure to furnish the necessary detail drawings in connection with the boilerhouse equipment and recessed radiators in various buildings (R. I, 42).

The court found that respondent was unreasonably delayed for a period of three and one-half months, due to the Government's failure promptly to terminate Redmon's right to proceed, that the cost of delay to respondent was $51,249.52,[4] and that the United States was liable therefor (R. I, 44).

Included in this recovery was an item for $18,093.52 representing the allocable overhead expenses at respondent's Montgomery office for 3½ months (R. I, 44). This figure was arrived at by subtracting from the general overhead expense allocated for respondent's own accounting purposes to this project, the overhead expense

[4] These expenses were made up of the following items (R. I, 44):

Salaries of supervisory and clerical forces and expenses at Roanoke for 3½ months	$11,344.40
Overhead expenses at Montgomery office for 3½ months	18,093.52
Liability and compensation insurance	4,661.07
Heating costs	4,124.73
Field expenses, resulting from delay in furnishing Boiler House information	290.89
Cost of grading, roads, and walks	12,734.91
Total	$51,249.52

which would have been so allocated if the project had been completed on November 1, 1934, as respondent had planned. There is, however, no finding that overhead expenses actually were increased because of the delay.

2. *Extra Labor and Materials.*—(a) *Use of Outside Scaffolds* (R. I, 44–48).—Respondent had planned to construct the brickwork without the use of outside scaffolds (R. I, 46). When respondent commenced the brickwork the Government's supervising superintendent of construction and his assistant orally directed respondent to build outside scaffolds, thus requiring the bricklayers to work from the outside of the building. Respondent asked for a written order, which was refused, the superintendent replying that while he could not order respondent to construct such outside scaffolds, he could and would make respondent sorry if he did not do so. (R. I, 47.) Respondent continued to lay the bricks from the inside[8] and the superintendent required that all bricks be laid uniformly on opposite sides of the building within $\frac{1}{16}$ of an inch. He also required that the mortar joints throughout the building

[8] There is no finding that any written authorization for the use of such outside scaffolding was ever obtained either from the contracting officer or the head of the department as required by Articles 3 and 5 of the contract, or that any appeal was taken to the contracting officer, and then to the head of the department, as required by Article 15, from the refusal of the superintendent to issue such an order.

not vary by more than 1/8 of an inch. Brickwork not meeting these exact requirements was rejected. The court below found these requirements to be unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith. (R. I, 47.)

Respondent, believing himself to be confronted with a situation which it was impossible to meet and overcome, proceeded to construct the outside scaffolds and to perform all brickwork from such scaffolds. (R. I, 47–48.) All of the brickwork could have been performed better, more nearly in accordance with the specifications and at much less expense by the customary and accepted overhand or inside method which respondent had planned to use. After the construction of the outside scaffolds, precise and exact requirements were no longer imposed. (R. I, 48.) Respondent's costs were increased by $25,886.84* as a result of the requirement that he use outside scaffolds (R. I, 48), and recovery in that amount was allowed.

(b) *Unreasonably Meticulous Inspection* (R. I, 48–49).—The court below found that because the Government officers at the site of the work were unreasonably meticulous and overexacting in their inspection, it was necessary for respondent to hire two additional men for the job to handle protests

---

*These expenses were made up of the following items (R. I, 48): (1) $10,466.88 for material and labor for scaffolds; (2) $12,990 for extra labor of brick masons; (3) $2,429.96 for actual loss from increased wages due to delay caused by unreasonable inspection requirements.

and appeals and to deal directly with the contracting officer in Washington. The need for the services of these additional men, whose salary and expenses amounted to $4,952.95, would not have arisen except for the unreasonable, unauthorized, and arbitrary acts of the Government officers at the site of the work. (R. I, 49–50.) Respondent protested orally to the superintendent and to the contracting officer with respect to the unreasonable inspection (R. I, 49), but there is no finding that respondent ever took an appeal to the head of the department.

(c) *Other Excess Costs* (R. I, 50–51).—The court below found that the Government officers at the site unreasonably and arbitrarily required respondent to do work and use materials not required by the contract (R. I, 50–51), for which the excess cost totalled $4,080.26.[1] There is no finding that these requirements of changes and extras were made in writing by the head of the department or the contracting officer as required by Articles 3 and 5 of the contract, and although there may have been oral protests to the contract-

[1] This claim is composed of the following items (R. I, 50–51): (1) $2,620.66, for erroneously requiring the bolting of metal pans used for laying concrete floors; (2) $1,352.10, for requiring fine grading in certain basements before the mechanical contractor had laid his pipes, respondent being required to regrade these basements at an excess cost after the pipes were laid; (3) $107.50, for temperature steel erroneously required to be used in certain two-way reinforced concrete slabs.

ing officer* (R. I, 49), there is no finding that any appeal was ever taken to the head of the department.

3. *Excess wages paid to reinforcing rodmen* (R. I, 51–62).—(a) The contract, which was financed from Public Works Administration funds, provided in Article 18 thereof that skilled labor should be paid not less than $1.10 an hour and unskilled labor not less than 45 cents an hour (R. I, 52). Before entering into the contract, respondent wrote to the Federal Emergency Administration of Public Works (PWA), pointing out that no rate of pay was fixed in the contract for semiskilled labor (R. I, 53–54), and by letter of September 11, 1933, respondent was advised by PWA that it was anticipated that certain semiskilled workers would be employed at a rate less than that for skilled workers (R. I, 54). Pursuant to a suggestion made by the Deputy Administrator of PWA to members of State Public Works Advisory Boards that a complete rate of compensation for labor be agreed upon (R. I, 54–55), the Virginia State labor conference on October 27, 1933, promulgated a schedule setting forth certain hourly wage rates, included among

* The finding as to oral protests to the contracting officer appears in connection with the claim for $4,952.95 for salaries and expenses of the two extra representatives engaged to handle protests (R. I, 49), but is worded somewhat ambiguously and may have been intended to refer to all claims involved in suit. For the purposes of this case, it will be treated as having the broader application.

which were carpenters on rough work at the rate of 80 cents per hour and apprentices, helpers or certain unskilled laborers at 60 cents per hour (R. I, 55). Prior to and during the performance of the contract, the work of placing and tying reinforcing steel rods was classed as semiskilled work in the construction industry generally and on certain other PWA contracts (R. I, 56). On March 9, 1935, after the completion of respondent's contract, reinforcing steel work was classified by PWA as semiskilled, calling for an hourly wage rate of 60 cents (R. I, 56).

Respondent had planned to use semiskilled labor at a rate of 60 cents per hour for placing the reinforcing steel rods (R. I, 56). On March 15, 1934, the Government's superintendent wrote to the Department of Labor, stating that the contract provided for only two scales of wages, namely, skilled and unskilled labor, and asking whether concrete reinforcing steel rodmen were considered skilled workmen (R. I, 57–58). The court below found that this letter failed to state the true controversy (R. I, 58). On March 20, 1934, the superintendent received a letter from the Department of Labor ruling that PWA had classified steel rodmen as skilled workmen (R. I, 59). The court below found that this did not constitute a ruling of the Department of Labor (R. I, 59). The superintendent thereupon required respondent to pay all rodmen the skilled rate of $1.10 per hour, including back pay to

the men who had theretofore been paid 60 cents (R. I, 59, 61), at a total additional cost to respondent of $4,365.12. Respondent protested against this requirement to the contracting officer, who, on the basis of the letter from the Department of Labor, approved the determination of the superintendent, but made no written ruling or independent decision on the question (R. I, 59). The court found that this act of the contracting officer was "unauthorized, arbitrary and so grossly erroneous as to imply bad faith" (R. I, 59). There is no finding that respondent ever appealed from the contracting officer's decision.

(b) The court also found that the Government's superintendent "arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the men engaged on reinforcing steel work and caused an unreasonable amount of idle time of steel crews on the job." The excess cost and damages resulting from this conduct were placed at $4,291.93. (R. I, 62.) Here again there is no finding that any appeals were taken from the acts of the superintendent, to either the contracting officer or the head of the department.

4. *Excess wages paid to semiskilled carpenters* (R. I, 62–64).—For the same reasons as existed with respect to the steel rodmen, the Government's superintendent required respondent to pay $1.10 per hour for all carpenter work, in-

cluding rough carpentry used for the construction of concrete forms and scaffolding (R. I, 63–64). The court found likewise that this ruling was "unauthorized, arbitrary and so grossly erroneous as to imply bad faith" (R. I, 64). The excess cost for carpenters' wages was found to be $26,354.19 (R. I, 64). Although there was a protest to the contracting officer, the court found that he came to no independent decision (R. I, 63–64), and there was no appeal to the head of the department.

5. *Subcontractor's Damages* (R. I, 64–70).—The Roanoke Marble & Granite Company was a subcontractor of respondent which had undertaken to furnish all the materials and labor necessary to install and complete the tile, terrazzo, marble, and soapstone work called for in the contract (R. I, 64). The Government's superintendent and the contracting officer required that all mechanics be paid a skilled labor rate and would not allow a lesser rate of pay for semiskilled labor (R. I, 65–66), although the custom of the trade permitted the use of an improver or a semiskilled assistant to each skilled mechanic (R. I, 64). There is no finding that any appeal had been taken to the head of the department from this requirement. As a result of this ruling, the subcontractor was required to expend $9,730.27 in excess of what the reasonable cost would have been had the subcontractor been permitted to use semiskilled labor. Respondent paid his subcontractor the

total consideration specified in the subcontract, but neither respondent nor the subcontractor has been paid by the Government for any part of such excess costs. (R. I, 70.) There is no finding that respondent is liable to the subcontractor for these costs.[9]

The Court of Claims entered its findings of fact and opinion on October 5, 1942, awarding judgment to respondent in the sum of $130,911.08. Judge Madden dissented as to the disposition of all items other than the claim of $51,249.52 caused by Redmon's delay, on the ground that there had been no appeal to the head of the department, as required by Article 15 (R. I, 92). After the decision of this Court in *United States* v. *Rice*, 317 U. S. 61, on November 9, 1942, the United States moved for a new trial, specifically calling the attention of the court below to the controlling effect of the *Rice* decision on the question of liability for delay. The motion for a new trial was overruled on March 1, 1943, without opinion or any reference whatsoever to the *Rice* decision (R. I, 93).

SUMMARY OF ARGUMENT

1. The Government was not liable to respondent for the latter's inability, caused by delays of another contractor on the job, to complete per-

[9] The final item of claim of $15,180.52, arising out of the requirement that respondent use local sandstone, was found by the court below to be without merit (R. I, 90–91), and the facts relating thereto are accordingly here immaterial.

formance 106 days ahead of the schedule called for by the contract. The Court of Claims should have followed *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61, under which the Government would not have been liable even if respondent had been delayed by the other contractor beyond the contract period. Absence of liability under the circumstances of this case is *a fortiori*. Nothing in the contract required the Government to terminate the other contractor's right to proceed merely because his rate of progress would not permit respondent to finish ahead of time. The Government's right to terminate the other contractor's right to proceed was limited by the terms of his contract, and since his successor completed the work on time, earlier termination by the Government might have been premature.

2. Respondent was barred from recovery on every item in dispute because he failed to appeal the disputes to the department head as required by Article 15 of the contract (Appendix A, *infra*, pp. 85-86), by which provision the decisions of the department head are made final. Arbitrary action of subordinate governmental officials at the project did not excuse respondent from pursuing the contractual remedy but on the contrary made its utilization the more imperative. The contractual remedy is designed to protect the Government as well as the contractor; it gives the contractor an administrative remedy and the Govern-

ment an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officials. Having agreed to accept this remedy, the contractor may not disregard it, let damages accumulate, and then seek redress in the Court of Claims. As nothing suggests bias or unfairness in the department head, respondent had no excuse for failing to appeal to him.

3. Respondent was not entitled to an award for the cost of materials and labor not required of him by the contract and specifications, because orders for such extra items were given orally by subordinates, and not in writing by the designated Government officer, as specifically required by two provisions of the contract. (Articles 3 and 5, Appendix A, *infra,* pp. 82–83.) Therefore under *Plumley* v. *United States,* 226 U. S. 545, recovery for extras was improperly allowed. Subordinate Government officials at the site may not by their arbitrary action waive this requirement because they are deprived by the contract of authority to bind the Government to changes or extras. Moreover, under well-settled rules a contractual provision requiring written orders cannot be waived orally. The decision below in effect enables subordinates to enlarge their powers by their own malfeasance.

4. The Court of Claims erred in awarding respondent damages for increased home office overhead resulting from the delay, because the court had

no evidence before it to show, and made no finding, that the delay actually caused any increase in respondent's overhead. Such an award, which has become the usual practice of the Court of Claims, cannot be justified in the absence of such evidence (*United States* v. *Wykoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263). The computation submitted by respondent on which the purported damage was calculated (Ex. 46–A; Appendix B, *infra*, p. 88) does not support the award; on the contrary it shows that overhead, normally a fairly constant figure regardless of the volume of work, did not increase during the period of the so-called delay.

5. A portion of the judgment was for damages suffered not by respondent but by a subcontractor. There is no finding or evidence that respondent was liable to the subcontractor for these damages. As the subcontractor was not a party to a contract with the Government he could not have sued the Government in the Court of Claims (*Merritt* v *United States*, 267 U. S. 338). As respondent is not liable to the subcontractor, respondent cannot be said to have suffered actual damages, clearly requisite to an award. In consequence the Court of Claims was without jurisdiction to make such an award.

6. In many instances, the evidence does not support the findings that the subordinate Gov-

ernment officers acted arbitrarily and in bad faith. While we believe that the Court should dispose of this case on grounds which make it unnecessary to consider this point, we feel that these findings cannot be permitted to go unchallenged, particularly since their frequent repetition strongly suggests that the Court of Claims was unmindful of the rule that only in the presence of compelling evidence may such extreme findings properly be made. We do not discuss the instances where there was evidence either way and hence some evidence on which such findings could be rested, but we do discuss some of the findings where the evidence when properly understood does not tend to support them.

ARGUMENT

I

THE GOVERNMENT WAS NOT OBLIGATED TO AID RESPONDENT IN COMPLETING HIS CONTRACT 106 DAYS BEFORE THE COMPLETION DATE SPECIFIED THEREIN

The largest single item of recovery was the allowance of $51,249.52 as damages for delay found to have been caused respondent by the Government (R. 43–44), whereby respondent was prevented from completing his contract 106 days prior to the stipulated completion date (R. 44). The conduct of the Government which the Court of Claims found adequate to sustain the award

of damages consisted, not of any affirmative acts causing delay, but of a failure to terminate earlier the right of the mechanical contractor to proceed; and the court apparently deemed immaterial the fact that when the Government effected such termination, the successor mechanical contractor completed the work within the originally stipulated time. In so holding the court below squarely disregarded *United States* v. *Rice*, 317 U. S. 61, and *Crook Co.* v. *United States*, 270 U. S. 4.

The instant case differs from the *Rice* and *Crook Co.* cases in one respect: Here the failure of the laggard contractor to proceed on schedule did not prevent the plaintiff contractor from completing his work within the contract period but merely from finishing ahead of schedule, whereas in those cases the plaintiff contractors were delayed beyond the original contract period. Nevertheless this Court held that the Government did not guarantee a contractor against delays due to delayed performance of other contractors which extended the work beyond the contract period. The freedom of the Government from liability where, as here, the delay did not prevent the work from being completed within the contract period would therefore seem to be *a fortiori*.

The instant contract does not differ in material characteristics from the contracts involved in the *Rice* and the *Crook Co.* cases. Those contracts

contemplated the presence of more than one contractor on the project and required each contractor to fit his work to that of the others. This characteristic was prominent in the reasons assigned by this Court for its conclusion that the Government did not guarantee that each contractor would be able to finish within the contract period, unimpeded by the others. The instant contract has the same characteristic, in express terms; yet the court below used this very feature of the contract as its reason for deciding this issue contrary to those decisions. Article 13 of both petitioner's and Redmon's contracts provided:

> *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Of this provision the court below stated (R. I, 31):

> Under this and other provisions of the contracts [10] the defendant assumed the obli-

[10] Nowhere in its findings or opinion does the court identify the other provisions of the contract which aided it in implying this obligation. Careful study of the contract has revealed none. The Government's argument therefore treats Article 13 as the sole basis for the implication.

> gation and duty of taking such action at the proper time as would prevent any contractor with defendant from unreasonably delaying or interfering with the work and progress of any other of the government contractors. The defendant failed to fulfill and discharge this obligation and duty under its contract with plaintiff, and by reason of such failure plaintiff was unreasonably delayed and put to extra and unnecessary costs and damages.

Plainly Article 13 contains nothing express on which to rest such a conclusion. The provision states that "the contractor *shall* fully cooperate with such other contractors" (italics supplied), which is an undertaking of the signatory contractor, not a promise or even a prediction by the Government of what other contractors will do. The purpose of the provision plainly is to obligate the contractor to proceed so as not to delay other contractors in order that the project may be completed on schedule; the provision is for the Government's protection. There is no corresponding undertaking by the Government guaranteeing one contractor against interference or delay caused by the other. It is impossible to discern in Article 13 the Government's affirmative duty, evoked therefrom by the court below, "to cooperate with [respondent] in every reasonable way" so that "the contract might be properly performed and completed as early as practicable." (R. I, 79.)

The Court of Claims was not without guidance from this Court as to the effect to be given provisions such as Article 13 especially when it is accompanied by one such as Article 9 of the instant contract, imposing liquidated damages upon the contractor for delay in completion unless due to such unforeseeable causes as "acts of the Government" (Article 9, Appendix A, *infra*, pp. 83–85). In *Crook Co.* v. *United States*, *supra*,[11] Article 27 of the general provisions annexed to the specifications, which became part of the contract, provided:

> The contractor will be required to carry on this work without interfering with * * * the operations of other contractors. * * * It is understood and agreed that the parties to the contract will, so far as possible, labor to mutual advantage where their several works in the above-mentioned or in unforeseen instances touch upon or interfere with each other.[12]

[11] The principles enunciated in the *Crook* case have been applied by the Court of Claims itself in a variety of cases presenting analogous or similar facts (*Detroit Steel Products Co.* v. *United States*, 62 C. Cls. 686, certiorari denied, 275 U. S. 525; *G. & H. Heating Co.* v. *United States*, 63 C. Cls. 164; *Carroll* v. *United States*, 67 C. Cls. 513; *Carroll* v. *United States*, 68 C. Cls. 500; *Gertner* v. *United States*, 76 C. Cls. 643). See also *Hooper Co.* v. *United States*, 40 F. Supp. 491 (W. D. Wis.); *Henry Shenk Co.* v. *Erie County*, 319 Pa. 100; *Corporation of President, etc.* v. *Hartford Acc. Etc. Co.*, 98 Utah 297; cf. *Edward E. Gillen Co.* v. *John H. Parker Co.*, 170 Wis. 264.

[12] R. 26, No. 122, October Term, 1925.

This language is much more susceptible to the interpretation adopted below than is the language of the contract herein, since the latter merely commands that the contractor "shall" not delay others, whereas the provision in the *Crook* case was an agreement that the signatory parties, one of which was the Government, would "labor to mutual advantage." Yet this Court declined to hold the Government liable for damages which the plaintiff contractor suffered from delays caused by the tardiness of other contractors, because as Mr. Justice Holmes said (270 U. S. 4, 6, 7):

> * * * it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. * * * It was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.
>
> * * * * * *
>
> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays.

> But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit.

The parallel is complete, for the instant contract, besides containing Article 13, also has the usual provisions for extensions of time (Article 9, Appendix A, *infra,* pp. 83–85), change orders (Articles 3 and 4, Appendix A, *infra,* pp. 82–83) and the like.

Guidance can also be found in *United States* v. *Rice, supra,* in which Articles 9 and 13 of the contract [13] were identical with Articles 9 and 13 of the instant contract.[14] There the Government itself by issuing a change order to the principal contractor, had caused the delay for which the mechanical contractor was seeking damages. This Court held that the Government had not guaranteed the contractor against being delayed past the

---

[13] R. 12, No. 31, October Term, 1942.

[14] Both the *Rice* contract and those herein were standard form contracts, and they did not differ in respects material to this issue. In each, Article 9, allowing the contractor an extension of time in which to complete performance in the event of delays caused by the Government, was identical.

contract period and was not liable therefor, saying (317 U. S. 61, 65):

> We do not think the terms of the contract bound the Government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the Government. The contractor was absolved from payment of prescribed liquidated damages for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The Government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *Crook Co.* v. *United States, supra,* 6.

Just as in the *Rice* case, the Government was not liable for delays caused by change orders

issued by it pursuant to its reserved contractual right, so here, the Government is not liable to respondent for delays caused him by the exercise of the Government's discretionary right to terminate the mechanical contract for nondiligent progress, a right reserved to it by Article 9 of the contract. Since all the factors deemed significant by this Court in determining the obligation in both the *Crook* and *Rice* cases are here present, the decision below is inadmissible under those authorities. The applicability of those decisions to the case at bar is not diminished by the circumstance that here the building contractor is suing for delay connected with the mechanical contract, whereas in the *Crook* and *Rice* cases, the mechanical contractor was suing for delay connected with the building contract. In both situations, the building and mechanical contract were essential parts of a single Government project; one was no more important than the other to the completion of the work desired by the Government. Article 13, contained in each contract, gave the building contractor no greater right to regulate the tempo of the work than it gave the mechanical contractor and no greater right to call on the Government for extra compensation if the tempo failed to suit its convenience.

Indeed, the conclusion against liability is here *a fortiori,* since respondent was not prevented from completing his work within the stipulated

contract period—the basis for complaint in the *Crook* and *Rice* cases. The unfairness of the interpretation placed on Article 13 by the Court below is highlighted by the fact that under this construction respondent could insist that the Government aid him in completing the work ahead of time, whereas the Government could not concomitantly insist that respondent finish in less than contract time. Such disparate obligations, so lacking in mutuality, should not be imposed without more explicit language in the contract.

Even if the *Crook* and *Rice* decisions were not available as precedents, there would be no justification for implying any obligation on the part of the Government to terminate Redmon's contract earlier and thus to aid respondent in completing his work 3½ months ahead of time. At the time the contract was executed neither the Government nor Redmon was aware of respondent's determination that the project would be completed three and a half months early;[15] such determination could hardly impose an obligation on Redmon to accelerate completion, or on the Government to exact such accelerated performance. Under Article 9 of its contract Redmon

[15] The contracts were signed before December 21, 1933, when the notices to proceed were received by the contractors (R. I, 34, 35). Redmon was first notified on January 24, 1934, and the Government on March 30, 1934, that respondent planned to complete the job by November 1, 1934 (R. I, 37).

could not have been placed in default so long as it did not delay the project to a point where in the opinion of the contracting officer there was no reasonable assurance of completion by February 14, 1935. There is at least a strong inference that the Government did not delay unreasonably in declaring Redmon's contract defaulted from the fact that the successor mechanical contractor and respondent both completed performance within the contract period. The Government certainly had no duty to make it possible for respondent to finish ahead of the time specified in the contract by risking an unreasonable termination of Redmon's contract and thereby releasing Redmon's surety from his obligation on his performance bond, and subjecting itself to a claim for breach of contract.

We submit, therefore, that the Court of Claims erred in refusing to follow *United States* v. *Rice, supra,* and *Crook Co.* v. *United States, supra,*[16] and that the Government was not liable for damages for delay.

---

[16] The Court of Claims seems to have refused to follow those decisions in other recent cases as well. See *Langevin* v. *United States*, No. 43903, decided May 3, 1943; *Rogers* v. *United States*, No. 44581, decided April 5, 1943; *Diamond* v. *United States*, No. 45419, decided March 1, 1943.

In the instant case, decision was made prior to this Court's decision in *United States* v. *Rice, supra*, but the Government filed a timely motion for new trial which was argued orally (R. I, 93) and in which the attention of the Court of Claims

II

RESPONDENT MAY NOT RECOVER ON ANY PART OF HIS CLAIM, SINCE HIS REMEDY WAS AN APPEAL TO THE DEPARTMENT HEAD AND HE DID NOT PURSUE THAT REMEDY

Notwithstanding respondent's failure to appeal disputes to the department head as provided by Article 15 (Appendix A, *infra*, pp. 85–86), the Court of Claims awarded respondent a recovery of $130,911.08.[17] This judgment comprised items which may be grouped within the following categories:

(1) *Delay:* Damages of $51,249.52, including $18,093.52 for home office overhead, caused by unreasonable delay in terminating the right of Redmon to proceed under his contract for the mechanical work; (2) *Extra Labor and Materials:* Damages of $29,967.10 for extra work and material improperly required of respondent, consisting

---

was specifically called to this Court's decision in *United States* v. *Rice*.

[17] Judge Madden dissented on all items except the delay, on the ground that respondent had failed to pursue the remedy afforded him by his contract. However, there is no suggestion of any reason for distinguishing between delay and the other items. It is clear that the contractor must follow the procedure provided by Article 15 even when there is a "dispute" about delays (*Ripley* v. *United States*, 223 U. S. 695; cf. *Plumley* v. *United States*, 226 U. S. 545, 548). That there was such a dispute in the instant case is clear from the fact that respondent contended that Redmon was delaying him, while the Government superintendent believed and reported the contrary to his superior (R. I, 44).

of (a) outside scaffolds $25,886.84, (b) bolting of metal pans for concrete slabs $2,620.66, (c) premature fine grading in basements $1,352.10, and (d) temperature steel in two-way reinforced concrete slabs $107.50; (3) *Excess Wages:* Damages of $40,449.58 for requiring a skilled rate of wages to be paid by respondent to reinforcing steel rodmen ($4,365.12) and semiskilled carpenters ($26,354.19) and by his subcontractor to semiskilled mechanics ($9,730.27); and (4) *Miscellaneous:* Damages of $9,244.88 for (a) the costs of extra employees hired as a result of unreasonably meticulous inspections ($4,952.95) and (b) interference with reinforcing steel workers ($4,291.93). All these damages were suffered as the result of the acts, rulings, and instructions of the Government superintendent and his assistant which the court below found were unauthorized by the contract. In addition, they were found by the court below to be unreasonable and in many instances arbitrary, capricious and so grossly erroneous as to imply bad faith.

As we shall develop hereinafter (*infra*, pp. 67–81), we believe that this characterization is unjustified and unsupported by substantial evidence in the case of many of the important acts and rulings of the Government's officers. But we submit that recovery was improperly allowed on every item because under the contract re-

spondent's remedy was an administrative appeal, which he failed to pursue, thus preventing any possibility of voluntary redress or settlement by the Federal agency of respondent's complaints before the damages accrued. Under the express terms of the contract and the pertinent decisions of this Court, this failure debars respondent from recovery.[18]

Article 15 of the contract in suit provides:

> Article 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.[19]

---

[18] As we shall also show, most of the listed items were improperly allowed for additional reasons.

[19] The form of Government contract here involved was "U. S. Government Form P. W. A. 51," the critical provi-

There is no doubt that the items for which recovery was allowed were the subject of "disputes concerning questions arising under this contract," and some were explicitly so treated by respondent when he appealed to the contracting officer from the decision or instruction of the Government superintendent thereon.[20] Of the items thus appealed, some were decided by the contracting officer in favor of respondent's contentions,[21] but those as to which the contracting officer's ruling was adverse to respondent in

---

sions of which are substantially the same as those in the standard form of Government construction contract. The provisions of this Article are substantially the same as the provisions of Article 15 of the standard form contract except that the latter limits the finality of administrative decision to questions of fact. See, e. g., Article 15 cited in *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 58.

[20] This was true of the following items, as to which the court specifically found that appeals were taken to the contracting officer: (1) The delay caused by Redmon, the mechanical contractor (R. I, 40); (2) the use of temperature steel (R. I, 51); and (3) the hourly wage rates to be paid for reinforcing rodmen, semiskilled carpenters, and semiskilled mechanics (R. I, 57, 59, 63, 68).

[21] The appeals were disposed of as follows (the numbering used here follows the preceding footnote): (1) The contracting officer declared Redmon in default on June 26, 1934 (R. I, 40). However, the court found that the Government had delayed unreasonably in so acting (R. I, 44). (2) The contracting officer allowed respondent thereafter to discontinue the use of temperature steel in two-way reinforced concrete slabs (R. I, 51). Respondent's claim in the present proceeding is for the temperature steel used prior to this ruling. (3) The contracting officer ruled against respondent as to the wage rates to be applied to semiskilled labor (R. I, 59).

whole or part were not further appealed to the head of the department or his duly authorized representatives as required by Article 15. As for the remaining items in suit, the record and findings below make plain that there was a sharp dispute between respondent's representatives and the Government superintendent and his assistant;[22] nevertheless, respondent did not appeal from the ruling of the superintendent to the contracting officer.[23] Nor, where the contracting officer could be said to have "acquiesced" in the superintendent's ruling (R. I, 80), was there any appeal therefrom to the head of the department or his duly authorized representative.[24]

In failing to appeal to the contracting officer the disputed actions and rulings of the Govern-

[22] This is true of the requirement of the superintendent that outside scaffolding be used to lay the brickwork (R. I, 47), the metal pans be bolted (R. I, 50), the fine grading in basements be prematurely done (R. I, 51), and of the interference with steelworkers (R. I, 62).

[23] This is implicit in the findings below, which always set forth explicitly an appeal taken by respondent to the contracting officer. (See R. I, 40, 51, 59, 63.)

[24] Such "acquiescence" by the contracting officer clearly constituted a decision by that official affirming the position taken by the superintendent, and as such, could be appealed to the head of the department. *Gold Mining Co.* v. *National Bank*, 96 U. S. 640. Cases such as *Karno-Smith Co.* v. *United States*, 84 C. Cls. 110; *Newport Contracting and Engineering Co.* v. *United States*, 57 C. Cls. 581; cf. *Cape Ann Granite Co.* v. *United States*, C. Cls. No. 44901, decided October 4, 1943, involving failure to decide or unreasonable delay in deciding such appeals, are therefore inapplicable.

ment superintendent,[25] and, where such an appeal was taken, in failing further to appeal to the head of the department or his duly authorized representative the adverse decisions and "acquiescence" of the contracting officer, respondent chose to ignore the clear provisions of Article 15. Nevertheless, the majority of the Court of Claims awarded respondent judgment on all items (R. I, 76). This is contrary to the well-established rule in this Court barring recovery where there has been a failure to pursue the remedy provided by the contract (*Plumley* v. *United States,* 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393). If the questions in dispute were erroneously answered by the contracting officer, "Article 15 of the contract provided the only avenue for relief" (*United States* v. *Callahan Walker Co.,* 317 U. S. 56, 61; *United States* v. *John McShain, Inc.,* 308 U. S. 512, 520). This would *a fortiori* be true where the contractor rests upon the ruling of a Government agent subordinate to the contracting officer.

Indeed, in most cases the Court of Claims itself consistently denies recovery to a claimant who

[25] The disputes regarding rates of wages were not submitted to the Board of Labor Review. The court found that such submissions were not necessary, since "no labor issue within the meaning of this provision arose under the contract" (R. I, 77, 87). For the purposes of the instant case, the Government does not contest that finding.

has failed to exhaust his appeals in accordance with Article 15 (*Bray* v. *United States*, 46 C. Cls. 132, 138–139; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734; *Horace Williams Co.* v. *United States*, 85 C. Cls. 431, 441; *General Contracting Corp.* v. *United States*, 92 C. Cls. 5, 12–13, 29; *Jacob Schlesinger, Inc.* v. *United States*, 94 C. Cls. 289; cf. *Steel Products Eng. Co.* v. *United States*, 71 C. Cls. 457, 476; *Winchester Mfg. Co.* v. *United States*, 72 C. Cls. 106, 138). This has been so even where the result seemed inequitable; "the contract is a harsh one but its language is perfectly plain and we can not reform it" (*Silas Mason Co., Inc.* v. *United States*, 90 C. Cls. 266, 275).

In the instant case, however, three judges of the Court of Claims[26] thought that compliance with the requirement of appeal was excused by the conduct of the Government superintendent and contracting officer. Thus, the court found that in the early stages of the project respondent did appeal to the contracting officer from acts and ruling of the Government superintendent (R. I, 81), but that the latter interfered with respondent's appeals and punished respondent for invoking the contract provision (R. I, 81); that respondent justifiedly concluded that "the best and most practical way of handling the matter of protests" was informally through conferences with

[26] Judge Whitaker did not participate in the decision.

the contracting officer in Washington for which two representatives of respondent were assigned full time;[27] and that in some instances the contracting officer, although agreeing with the claims of the respondent, signified his inability to help him (R. I, 82). The court concluded that these conditions excused respondent from complying with the provisions of Article 15, and therefore entitled him to recover despite his failure to pursue the remedy provided by the contract.

Besides the questionable factual assumptions made by the court,[28] its holding that respondent was relieved from compliance with the conditions of Article 15 is apparently based on a misapplication of the principle that administrative decisions, although entitled to finality under the contract, may be set aside if arbitrary, capricious, or so

---

[27] An item of $4,952.95 representing the salaries and traveling expenses of these men has been included in the award allowed respondent by the Court of Claims (R. I, 85).

[28] It seems extremely unrealistic to assume, as did the court below, that a large contractor with long experience in Government contracts (R. I, 38) should hesitate to appeal to the contracting officer from rulings of the superintendent involving substantial differences in cost, such as that requiring the use of outside scaffolding which increased his costs by $25,000, merely through fear of retribution from the officer subordinate to the contracting officer. Cf. *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87. Any such inference is indeed belied by the court's own findings that throughout the contract period respondent did not hesitate to take appeals on many items involving much smaller amounts. See footnote 20, p. 34. In fact, the frequency with which respondent presented protests and appeals required his assigning two employees to handle such matters exclusively. (R. I, 49–50).

grossly erroneous as to imply bad faith (*Ripley* v. *United States,* 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393; *Kihlberg* v. *United States,* 97 U. S. 398, 401), and the principle that the requirement of appeal is dispensed with where the arbiter is prejudiced or has prejudged the dispute (*United States* v. *Smith,* 256 U. S. 11, 16).

These rules are plainly inapposite here. There is no finding nor any evidence to support a finding that appeal to the head of the department or his authorized representative would have been futile or that he was prejudiced against respondent or had prejudged any issue decided by a subordinate; and since he had not been given any opportunity to pass on any dispute under the contract, it was impossible to find that he was likely to adopt an arbitrary or capricious position. While the Court did find that the superintendent and his assistant acted arbitrarily and capriciously, the decisions of these officers are explicitly deprived of finality by Article 15, being subjected to review by the contracting officer and the head of the department at the instance of the contractor. Hence, the arbitrary nature of the subordinate's ruling does not excuse respondent's failure to pursue the remedies provided by his contract (*Fitzgibbon* v. *United States,* 52 C. Cls. 164, 169; cf. *Silas Mason Co., Inc.,* v. *United States,* 90 C. Cls. 266, 273, 275.) On the contrary, such arbitrary rulings by subordinates

make imperative the use of the contemplated appeals to superiors.

The more reprehensible the error of the subordinate officer, the more cogent become the reasons for requiring appeal to higher authority as a condition to asserting the claim in litigation. This is nowhere more strikingly demonstrated than in the instant case. The lower court found that the superintendent and his assistant had by their improper rulings and actions caused respondent a great deal of monetary damage for which the Government should be held liable. If appeals had been taken, as required by Article 15, the most responsible official—the head of the department—would have had an opportunity to consider all of respondent's claims, and to reverse any improper rulings of his subordinate. By thus relieving respondent of the necessity of expending time, labor, material, and money to conform with improper rulings of the subordinate, the head of the department would have mitigated any damages respondent suffered as a result thereof. These decisions of the head of the department, whether favorable or unfavorable to respondent, would, unless shown to be arbitrary or capricious, have been final and not subject to judicial review (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 59). Thus, by following the procedure provided by Article 15, respondent

might well have been relieved of the necessity of incurring the costs and expenses for which he is suing. Moreover, presentation of the dispute to the head of the Department would have enabled the Government to obtain the work contracted for without the additional expense and delay due to any unnecessary requirements by the subordinate.

By electing to proceed with construction upon the rulings of subordinate officials, and after completion to submit to judicial decision claims for substantial damages caused by such rulings, without giving the head of the department an opportunity to settle the dispute or to prevent the accrual of large items of damage, respondent has ignored a provision of great importance to the Government.[29] And by approving this course of action, and allowing recovery under these circumstances the court below has unjustifiedly relieved respondent of a substantial obligation which he voluntarily assumed, and has denied to the Government a valuable right for which it expressly bargained. As Judge Madden aptly observed in his dissenting opinion below (R. I, 92):

---

[29] So valuable to the Government is a provision such as Article 15, affording the Government an opportunity to mitigate damages caused by improper rulings or actions of its subordinate officials, that it may be doubted whether the Government would have entered into any contract which did not contain it. (Cf. *Kihlberg* v. *United States*, 97 U. S. 398, 401.) In fact, all standard form Government contracts do so provide.

> the Government has the right to contract, if the contractor is willing, that the Government shall not be subject to damage suits for disagreements between its inferior agents and the contractor, without giving the Head of the Department an opportunity to right the alleged wrong before it has grown into a big claim against the public funds. And the fact that the inferior agent on the job does not act in good faith does not make it less necessary that his superiors, who presumably would deal fairly with the contractor, should have an opportunity to pass upon the dispute.

The Government therefore submits that it was error for the lower court to allow respondent recovery for improper actions of the Government's officials at the site where no appeal was taken to the contracting officer or the head of the department, as required by Article 15 of the contract.

The Government believes that respondent's failure to take the appeal required by Article 15 bars recovery on all the items for which recovery was allowed. However, we believe that most of the items here involved should have been denied upon other grounds as well. And since the principles involved in such other grounds are of great importance to the proper disposition of a considerable body of litigation now pending and constantly being instituted in the Court of Claims, we discuss them fully hereinafter.

III

RESPONDENT IS NOT ENTITLED TO AN AWARD FOR "EXTRAS" AND "CHANGES" NOT ORDERED IN WRITING BY THE GOVERNMENT OFFICER AS REQUIRED BY ARTICLES 3 AND 5 OF THE CONTRACT

A substantial amount of the judgment for $130,911.08 consists of damages awarded on account of excess costs to respondent for extra materials and labor which he contended were improperly required of him by the Government's representatives. The rationale of this recovery was that the work, labor, and materials thus required were outside of or in addition to the obligations of respondent under the contract and specifications. But on this assumption, recovery was improper because the requisite written order for such additional work and materials was not issued by the proper Government officer, as explicitly provided in the contract.

Article 3 of the contract (Appendix A, *infra*, p. 82), entitled "Changes," provides, as does the standard form of Government contract, that the contracting officer may "by a written order" make changes in the drawings or specifications of the contract, and if the changes cause an increase or decrease in the amount due under the contract or the time required for its performance, "an equitable adjustment shall be made and the contract shall be modified in writing accordingly." Any change "involving an estimated

increase or decrease of more than $500" must be "approved *in writing by the head of the department or his duly authorized representative.*" Article 5 of the contract (Appendix A, *infra*, p. 83), entitled "Extras," provides that "no charge for any extra work or material will be allowed unless the same has been ordered *in writing* by the contracting officer and the price stated in such order." [Italics supplied.]

All the labor and materials for which the court below allowed recovery, on the ground that they were improperly required of respondent, were either substitutions for, or additions to, the labor and materials called for by the contract and specifications. As such, they were required by Articles 3 and 5 to be ordered in writing by either the contracting officer, the head of the department, or the latter's duly authorized representative. But the findings and opinion of the court below show beyond doubt that none of the extra work and materials for which recovery was allowed were thus ordered; rather they were ordered orally by the Government's superintendent at the site, or his assistant. This was true of the outside scaffolding which the court below found was improperly required of respondent and for which increased costs of $25,886.84 were allowed (R. I, 48), and other extra work and materials not called for by the contract such as the bolting of the metal form pans used in pouring

concrete slabs, the performance of certain fine grading work in the basements of certain buildings a second time, and the use of temperature steel in two-way reinforcement of concrete, for all of which $4,080.26 was allowed (R. I, 48). It is also plain from the findings and opinion of the court that neither of these officials was authorized to issue written change orders or written orders for extras,[30] that no price for the extras was agreed upon, and that no approval was secured from the head of the department for changes involving more than $500.[31]

Since the extra materials and labor required by the oral instructions of the Government superintendent and his assistant were not ordered "by the officer and in the manner required by the contract," recovery therefor was improperly allowed (*Plumley* v. *United States,* 226 U. S. 545, 547). In the *Plumley* case this Court considered a contractual provision closely analogous

---

[30] A letter of April 24, 1934, from the contracting officer to respondent (Ex. 101; see footnote 40, p. 80, *infra*) expressly states that all changes and extras could be authorized only by the contracting officer.

[31] It is unnecessary for present purposes to determine whether the items in question were "changes" under Article 3 or "extras" under Article 5, since neither Article has been satisfied. In considering generally whether respondent should be allowed to recover, the Court of Claims discussed both Articles 3 and 5 as relevant, but held compliance therewith had been waived.

to Articles 3 and 5 of the instant contract, and in denying recovery for extra work ordered orally by an inferior Government officer, said (226 U. S. at 547–548):

> The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract. Rev. Stat., § 3744; *Hawkins* v. *United States*, 96 U. S. 689; *Ripley* v. *United States*, 223 U. S. 695; *United States* v. *McMullen*, 222 U. S. 460.

The rule thus enunciated in the *Plumley* case is well-settled, not only in the field of Federal contracts, but is almost universally followed in regard to similar provisions in construction contracts with state or municipal governments (*Duncan* v. *Miami County*, 19 Ind. 154; *Delaney* v. *John O. Chisolm & Co.*, 166 La. 406; *Schneider* v. *Ann Arbor*, 195 Mich. 599; *Condon* v. *Jersey City*,

43 N. J. L. 452; *Callan* v. *Peck*, 37 R. I. 227; *Thomsen* v. *Kenosha*, 165 Wis. 204). Indeed, until very recently the Court of Claims itself recognized the inherent soundness of this rule and adhered very strictly thereto. (See, *e. g.*, *Daly & Hannan Dredging Co.* v. *United States*, 55 C. Cls. 1, 6; *Griffiths* v. *United States*, 74 C. Cls. 245, 256, 257; *Louise Hardwick* v. *United States*, 95 C. Cls. 336, 343; *McGlone* v. *United States*, 96 C. Cls. 507, 535, 536; *B-W Construction Co.* v. *United States*, 97 C. Cls. 92, 111.)

In the instant case, however, the Court of Claims refused to follow that rule because it thought the action of the Government's superintendent and his assistant was such as to excuse respondent's "failure to strictly follow and comply with the literal language of Articles 5 and 15 of the contract" (R. I, 79).[22] If this is so, then inferior agents on the site can, by their actions and attitude toward the contractor, waive the provisions of the contract restricting their authority and requiring written orders and written approval from the contracting officer or head of the department. There is no basis for such an extraordinary rule, in reason or precedent. The officials represented the Gov-

[22] In *Armstrong and Co.* v. *United States*, C. Cls. No. 44583, decided March 1, 1943, the Court of Claims, with the Chief Justice and Judge Whitaker dissenting, allowed recovery for extra work not ordered in writing. Judges Madden and Littleton expressly disapproved of and refused to follow the *Plumley* case. Judge Jones concurred on another ground.

ernment at the site, solely for the purpose of superintending the construction of the project and of enforcing compliance with the contract and specifications as drawn and were without authority to modify the specifications by ordering "changes" or "extras"; such authority was explicitly reserved by Articles 3 and 5 of the contract to the contracting officer, or to the head of the department or his duly authorized representative.[33] In the absence of such authority, an order for "changes" or "extras" issued by them would be without binding effect on the Government (*United States* v. *Barlow*, 184 U. S. 123; *Morgan* v. *United States*, 59 C. Cls. 650).

Even if by some construction the superintendent and his assistant could be deemed delegates of the authority to issue orders for "changes" or "extras"—a delegation without factual basis in the record or findings, and with a highly questionable legal basis under the wording of Article 5—the source of the authority would still leave them without power orally to bind the Government. For under well-settled law, an agent authorized under a contract for private construction to bind his principal by written order cannot do so

[33] There is no finding, nor any evidence in the record, to indicate that either the Government's superintendent or his assistant was an authorized representative of the head of the department or of the contracting officer for the purposes of Articles 3 and 5.

orally (*Benson & Marxer* v. *Brown*, 190 Iowa 848; *McNulty* v. *Keyser Office Building Co.*, 112 Md. 638; *Cashman* v. *Boston*, 190 Mass. 215; *Langley* v. *Rouss*, 185 N. Y. 201; *Bannon* v. *Jackson*, 121 Tenn. 381). In view of the Government's "good grounds for insisting that all modifications be in writing" and that "only designated officials may approve cost raising changes" (*Yuhasz* v. *United States*, 109 F. (2d) 467, 468 (C. C. A. 7)), that rule should *a fortiori* be applied to contracts with the Government, financed by public funds.

Nor can noncompliance with Articles 3 and 5 be excused by a refusal of the subordinate officials at the site to recommend the issuance of an order by their superiors. Since the order in question is to be issued by the contracting officer or head of the department, it is to these officers that the contractor must address himself, as he must indeed resort to them for redress from any other act or ruling of the subordinates at the site which he considers improper (cf. Article 15). The view adopted below—that "unreasonable, arbitrary, and capricious" conduct and rulings of the subordinates at the site will excuse strict compliance with the contract—amounts to the holding that Government officers, by their own malfeasance, may invest themselves with greater powers than are delegated to them by their superiors, regard-

less of the resulting prejudice to the Government. This not only violates traditional concepts of the law of agency, but disregards the accepted doctrine that the United States is not bound by the unauthorized and even tortious acts of its agents, whether they are asserted as the basis of a claim against the Government (*Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Tempel* v. *United States*, 248 U. S. 121; *Gibbons* v. *United States*, 8 Wall. 269, 274), or as waiving a defense which the Government could otherwise assert (*United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 534).

The error below, in allowing recovery for work and labor found not to have been called for by the contract and specifications, without a written order "by the officer and in the manner" required by Articles 3 and 5, is, we believe, unmistakable.

IV

RESPONDENT IS NOT ENTITLED TO OVERHEAD COSTS NOT SHOWN TO HAVE BEEN ACTUALLY INCURRED AS RESULT OF THE GOVERNMENT'S DELAY

In awarding respondent damages on account of the Government's delay, the court below allowed not only the excess costs incurred by respondent as a result of the delay but also an item of $18,093.52 for overhead expenses at respondent's home office in Montgomery, Ala., for the 3½-month period from November 1, 1934, to Febru-

ary 14, 1935—the period of delay found to have been caused by the Government (R. I, 44).[34] This figure of $18,093.52 was arrived at as follows (Exhibit No. 46–A; Appendix B, *infra*, p. 88):

(1) The total of overhead expenses of the Montgomery office for the period January 1, 1934 (when construction began), to February 14, 1935 (when it was completed), was divided by the total payments earned on all jobs during that period, resulting in a figure of 5.1421 percent representing the ratio of overhead costs to earnings, which was applied to the total payments earned on the instant project during that period; the result, $63,163.03, was considered to be the overhead costs chargeable to the instant project.

(2) The total of overhead expenses of the Montgomery office for the period January 1, 1934, to November 1, 1934, was then divided by the total earned on other projects during that period, plus the payments earned on the instant project during the entire contract period of January 1, 1934, to February 14, 1935; the resulting figure of 3.6692 percent was applied to the payments earned on the instant project during the entire contract

[34] The Court also allowed respondent $11,344.40 for "salaries of supervisory and clerical forces and expenses at Roanoke [the site of the project] for 3½ months" (R. I, 44). The Government is not contesting this allowance of "field office overhead," as an element of damage for delay, if this Court holds it so responsible, contrary to our contentions (pp. 20–30, *supra*). We therefore do not deal with it as part of the issue now under discussion.

period; the result, $45,073.51, apparently was considered to be the overhead costs which would have been chargeable to the project if it had been completed on November 1, 1934, as respondent had planned. The difference between these two figures, $18,093.52, purportedly representing the increased overhead costs chargeable to the present project because of the delay, was included by the court in the award of costs incurred on account of the delay. There was no finding, nor any contention by respondent, that the delay in fact caused an increase of $18,093.52 in respondent's overhead costs.

The allowance to successful plaintiffs of a portion of the overhead at their central office, based upon a ratio to gross receipts, labor costs, and other rules of thumb, without requiring any proof that the overhead was in fact increased to any such extent as a result of the breach of contract, has become a common practice in the Court of Claims.[35] It is submitted that the practice is devoid of legal basis and should be condemned.

---

[35] In *Young Engineering Co., Ltd.* v. *United States*, 98 C. Cls. 310, in which the court also allowed damages for delay, general office overhead was charged in the proportion which the direct labor on the contract in suit bore to the entire direct labor involved on all of claimant's contracts. Such allocation attributed 70% of claimant's overhead to the contract involved. In *Severin* v. *United States*, C. Cls. No. 44621, decided June 7, 1943, the Court of Claims allowed the claimant an award for home office overhead on the basis of a similar allocation. See also *Dow Pump Co.* v. *United States*, 68 C. Cls. 175.

Overhead costs such as those involved in the instant case generally are stable, continuous costs which are incurred independently of the number or progress of the projects in operation (I. Taussig, *Principles of Economics* (4th ed. 1939) p. 203; Paton, *Accountants' Handbook* (3rd ed. 1943) p. 137). As the nomenclature suggests, overhead consists of expenses which are actually not attributable to any one unit of production, but rather constitute the costs of being in business. (Cf. *Lytle, etc., Co.* v. *Sommers, etc.*, 276 Pa. 409, 413; Gemmill, *The Economics of American Business* (Rev. ed. 1935), p. 431.) Generally included in such overhead costs are items such as office rent, salaries of executives and other key employees, contributions to charities, and to trade associations (e. g. Chamber of Commerce), subscriptions to trade periodicals, and similar expenses which clearly bear no relation to the volume of business being performed and which must necessarily be incurred, even when business has reached a minimum, in order that the concern may remain as a going enterprise capable of functioning as a unit (Marshall, *Principles of Economics* (8th ed. 1938), p. 360). It is true that proper accounting practice requires that these overhead costs be allocated among the various units of production or projects in operation. But such allocation is merely an accounting device for the purpose of computing profit or loss on each unit or project; it does not

reflect in any way a cost incurred for the project to which it has been allocated (Gemmill, *The Economics of American Business* (Rev. ed. 1935), p. 431; cf. Paton, *Accountants' Handbook* (3rd ed. 1943), p. 137). For example, where units of production are homogeneous, each unit is charged with a proportionate share of the overhead, and therefore the amount charged to each unit would vary inversely with the volume of production. Thus where 10 units are produced, one-tenth or 10% of the overhead costs is allocated to each unit, whereas if production is decreased to five, the burden to be borne by each unit increases to one-fifth or 20% of the total overhead costs—which may remain fairly constant whether 10 or 5 units are produced (Myers, *Elements of Modern Economics* (Rev. ed. 1941), p. 132). Hence the overhead cost charged to each unit may increase because the volume of production has decreased, leaving fewer units among which to allocate the constant burden of overhead costs.

These elementary principles of economics implicitly recognize the lack of any causal relationship between the amount of overhead to be allocated to a project as an accounting matter, and the duration or size of the project. That there was no causal relationship in the instant case is made plain by respondent's Exhibit 46-A, which is the basis of his claim for recovery of overhead costs. Besides showing the stable and continuous nature of his home office overhead,

the exhibit conclusively demonstrates that the delay did not cause any increase in these overhead expenses, and that allocation of an additional amount of the continuing overhead to Roanoke because of the delay was the result of computation made soley for accounting purposes, having no tendency to establish damage.

According to that exhibit, during the period of the instant contract respondent's monthly overhead costs remained relatively stable despite wide fluctuations in earnings. The exhibit separates overhead expenses into salaries and other expenses, and shows that except for December 1934, salaries which constitute the overwhelming proportion of these expenses varied between $7,320 and $5,765 monthly, a variation of only $1,500; and the same is true of the other items of overhead expense. Respondent's earnings during this period on the other hand, varied between $281,757.47 and $28,480.21, a spread of more than one-quarter of a million dollars. Moreover, apart from the disparity in the extent of fluctuation, the variations in earnings do not bear any relation to the variations in overhead expenses. Thus, during August 1934, when respondent's earnings were at their peak, his total overhead expenses were very low; whereas during December 1934, when earnings were very low, total overhead expenses were highest.

That the delay caused no increased overhead is equally clear. During the three and one-half

months after November 1, 1934, which the court below found was the additional working time at Roanoke caused by the Government's delay, respondent's overhead expenses (except for December 1934, when they increased), were approximately the same as for the months previous thereto. During that time, virtually all of respondent's earnings were from the instant project; hence, since overhead costs remained stable while other earnings fell off, the instant project was, for accounting purposes, required to bear a larger share of the overhead expenses. The decline in over-all earnings during that period explains the increase from 5.1421% to 9.243% in the ratio between earnings and overhead expenses.

If, instead of decreasing, respondent's earnings during that period had increased, the amount of overhead costs chargeable to the project in suit might have been considerably less. Indeed, on respondent's method of computing the allocation of overhead costs on an over-all basis, a sufficient increase in volume after November 1, 1934, would have resulted in a smaller charge of overhead to this project than the amount allocable if the project had been completed as planned. These considerations establish that the overhead during the period of delay would have continued in approximately the same amount whether or not the delay had occurred; that the amount allocable to the instant project under accounting principles depends upon such fortuities as the

amount of other business currently being done; and that these accounting principles, while pertinent to the preliminary estimate of the extent to which overhead should be included in the bid, are not pertinent as a measure of the damages sustained because the project lasted longer than was anticipated.

Nor has respondent shown any prejudice, from the standpoint of devoting the facilities and services for which the overhead was incurred to the instant project for a longer time than had been planned. Respondent does not allege, and there is nothing in the record to show, that during that period respondent was unable to undertake additional work because of the delay at Roanoke. On the contrary, respondent's earnings and overhead during other months indicate clearly that between November 1, 1934 and February 14, 1935, he could have undertaken additional work without any serious increase in overhead.

Consequently, respondent has failed to establish that as a result of the delay he incurred overhead expenses amounting to $18,093.52 in excess of those he would have had if no delay had occurred. In the absence of such a showing, the award by the lower court was erroneous, since the liability of the Government for a breach of contract, including one causing delay to the contractor, is limited solely to the actual costs incurred as a result of the breach (*United States* v. *Smith*, 94 U. S. 214, 218, 219; *United States* v. *Wyckoff*

Pipe & Creosoting Co., Inc., 271 U. S. 263, 266, 267; *Cotton* v. *United States*, 38 C. Cls. 536, 547). A mere showing that because the project was extended into a period when earnings from other projects were low, there was charged to the instant project a larger amount of the continuing overhead costs which would have been incurred irrespective of the delay, does not of itself justify an award of the increased charge as "the loss actually sustained by the contractor as a result of the delay" (*United States* v. *Wyckoff Pipe & Creosoting Co., Inc., supra*, at 266). There is no showing that any overhead expenses, such as extra letters written, extra telephone calls made, or extra employees hired, were incurred because of the delay; there is consequently no basis in fact for the award by the lower court of $18,093.52 as increased overhead costs. This increase, whatever its justification in accounting theory, is purely hypothetical, and is not shown to be damage caused by the Government's alleged breach.[36]

The fact that overhead costs may be included

---

[36] In the *Young Engineering Co.* case, *supra*, the Court of Claims included in the award for overhead expenses a portion of the salary of the claimant's president; the rent, taxes, and other expenses of the claimant's office and yard; items which clearly were unaffected by the delay for which recovery was allowed.

in the contractor's bid does not justify recovery of an additional amount because of the Government's delay. When a contractor prepares to submit a bid to the Government, he customarily includes therein an allocable portion of general overhead, computed presumably in accordance with proper accounting principles. Such overhead costs are included in the contract price because that price is the result of voluntary agreement between the contractor and the Government, just as any items—whether cost or profit—may be included in a bid which reaches a total satisfactory to the Government. But, in the event of a breach of contract requiring additional labor and materials or additional time of performance of the contractor, the criterion of recovery is not one of voluntary agreement, as it was at the outset, but one of the application of a rule of law—the extent to which the breach caused loss or damage to the contractor. That rule of law requires that a requisite casual relationship be established between the breach and the damage; and this has not and can not be shown in respect of continuing overhead expense that would be incurred to the same extent whether or not the breach had occurred. Accounting principles which may be proper guides in the allocation of a continuing cost among units of production in

determining bids can have no legitimate place in the application of a rule of law traditionally based on causality. It is not unfair, in view of these considerations, to require a contractor to show the extent to which his overhead costs were actually increased as a result of the breach before he is permitted to recover any such items as damages.

V

THE COURT OF CLAIMS HAD NO JURISDICTION TO ALLOW RECOVERY ON THE CLAIM FOR THE USE OF THE SUBCONTRACTOR

Included in the judgment rendered for respondent is an award of $9,730.27 on a claim which respondent asserted "to the use and benefit" of Roanoke Marble & Granite Co., Inc., a subcontractor with respondent for the tile, terrazzo, marble, and soapstone work. This award was based on a requirement of the Government's superintendent that the subcontractor pay skilled rates of wages for labor which the court found to be of semiskilled classification, the recovery representing the difference in cost (and overhead) between the skilled and semiskilled rates (R. I, 70). The court also found that respondent had paid the subcontractor only the amount stipulated in the original contract (R. I, 70), and there is no allegation in respondent's petition in the court below, nor any finding by the court, that respondent ever paid or was under any obligation to pay the

subcontractor the amount now claimed on its behalf. In the absence of such a finding, we submit that the granting of recovery to respondent for the excess costs of the subcontractor was beyond the jurisdiction of the Court of Claims.

The power of the court below to grant recovery on this item is apparently rested by respondent upon the Tucker Act, which confers jurisdiction upon the Court of Claims to hear and determine claims against the United States, "founded upon * * * any contract, express or implied, with the Government of the United States" (Judicial Code § 145 (1); 28 U. S. C. § 250 (1)). It is not pretended that there is "any contract, express or implied," between the subcontractor and the United States; and the subcontract with a Government contractor will not itself support a suit by the subcontractor against the United States under the Tucker Act (*Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Driscoll*, 96 U. S. 421; *Petrin* v. *United States*, 90 C. Cls. 670; *Herfurth* v. *United States*, 89 C. Cls. 122; *New York Shipbuilding Co.* v. *United States*, 65 C. Cls. 457). There being no contractual relationship between the subcontractor and the United States, his sole rights of redress for damages caused him by acts of the Government must be based on his contract with the prime contractor. (See *Petrin* v. *United States*, 90 C. Cls. 670; *Herfurth* v. *United States*, 89 C. Cls. 122.)

As a contractor with the United States, respondent of course has standing to institute proceedings in the Court of Claims to recover damages which he himself has suffered as a result of alleged breaches of his contract with the Government, and in the case at bar he has in fact asserted such claims. Assuming that the claim here in question is based upon an alleged breach of respondent's contract, respondent, as plaintiff in an action for breach of contract, is entitled, under familiar principles, to recover only the damages which he himself has sustained. Like the plaintiff in a suit between private parties, a Government contractor "can recover no more than the loss he has suffered and of which he may rightfully complain" (*Perry* v. *United States,* 294 U. S. 330, 354–355; cf. *United States* v. *Wyckoff Pipe & Creosoting Co.,* 271 U. S. 263, 267). This means actual damage to the plaintiff for "the Court of Claims has no authority to entertain an action for nominal damages" (*Perry* v. *United States,* 294 U. S. 330, 355; *Grant* v. *United States,* 7 Wall. 331; *Marion & Rye Railway Co.* v. *United States,* 270 U. S. 280; *North* v. *United States,* 294 U. S. 317).

This element—actual damage to plaintiff—is absent in the instant claim. Whether or not the subcontractor has incurred losses as a result of the alleged breach, there is no finding that re-

spondent is or was under any liability, existent or discharged, to the subcontractor in respect to such losses (cf. *Leary Construction Co.* v. *United States*, 63 C. Cls. 206; *Penn Bridge Co.* v. *United States*, 71 C. Cls. 273), and there is no other conceivable manner in which respondent could suffer actual damage by virtue of the excess costs allegedly incurred by the subcontractor.

That actual or potential damage to plaintiff himself is essential to recovery on a claim such as here involved was indeed recognized by the court below only seven months after its decision in the case at bar, when it denied recovery to a contractor upon a similar claim because the subcontract expressly disclaimed any liability on the part of the contractor to the subcontractor for the acts of the Government upon which the claim was based (*Severin* v. *United States*, C. Cls. No. 43421 (decided May 3, 1943), certiorari applied for, October Term, 1943, No. 223). The same result should logically follow where the subcontract, by its silence on this question, permits the loss to rest with the subcontractor.

Nor can respondent be regarded as assignee of the subcontractor's claim, and thus vested with standing to recover. The subcontractor, as already shown, had no claim against the United States and consequently nothing he could assign

(*United States* v. *Buford*, 3 Pet. 12; *Maryland Casualty Co.* v. *Dulaney Lumber Co.*, 23 F. (2d) 378 (C. C. A. 5), certiorari denied, 277 U. S. 598). But even if he had a claim, its assignment was forbidden by statute unless it had been allowed and a warrant issued for its payment (Rev. Stat. § 3477, 31 U. S. C. § 203; *Severin* v. *United States*, *supra*) conditions not alleged or shown to have been complied with in the case at bar[37] (*Martin* v. *National Surety Co.*, 300 U. S. 588, 594). Nor would respondent's position be improved if his assertion of the claim for the use and benefit of the subcontractor be viewed as a form of declaration of trust, since the prohibition in Rev. Stat. § 3477 "strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an

[37] Rev. Stat. § 3477 provides: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part, or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." The Act of October 9, 1940, 54 Stat. 1029, amending Rev. Stat. § 3477 to permit assignments under broader conditions, requires the consent of the head of the department or agency concerned for the assignment of a claim under any contract entered into prior to October 9, 1940—a consent not alleged or shown to have been obtained here.

interest in the claim in any other than himself" (*Spofford* v. *Kirk*, 97 U. S. 484, 488–489; see also, *National Bank of Commerce* v. *Downie*, 218 U. S. 345; *Seaboard Air Line Ry.* v. *United States*, 53 C. Cls. 107; *Packard Co.* v. *United States*, 59 C. Cls. 354). In point of fact, respondent's petition in the Court of Claims explicitly negates any interest in the instant claim, alleging that "plaintiff is the sole owner of the claims set forth in this petition, except as to claim * * * for which plaintiff sues to the use of * * * his subcontractor. No assignment or transfer of said claims or of any part thereof or interest therein has been made" (R. I, 11).

Since respondent is without any interest in the claim, the present proceeding "to the use and benefit" of the subcontractor becomes merely the offer of a volunteer, who has access to the Court of Claims, to recover for another who is denied such access, that which the latter is admittedly unable to recover for himself. There is nothing in the Tucker Act which can be construed to permit such an action—in effect an attempt to circumvent the subcontractor's inability to sue or recover on his own behalf. The Tucker Act conferring jurisdiction upon the Court of Claims to hear and determine claims against the United States merely states the conditions upon which the United States consents to be sued in that court. (*United States* v. *Sherwood*, 312 U. S. 584, 586–

587; *Minnesota* v. *United States,* 305 U. S. 382, 388; cf. *Stanley* v. *Schwalby,* 162 U. S. 255, 270). Besides the principle that such jurisdiction is entitled to strict construction (*United States* v. *Michel,* 282 U. S. 656; *Price* v. *United States and Osage Indians,* 174 U. S. 373; *Schillinger* v. *United States,* 155 U. S. 163)[38] its extension to the present case is made additionally difficult by the circumstance that where Congress intended to permit suit by subcontractors, it specifically so provided. (See Act of June 25, 1938, c. 699, 52 Stat. 1197; Act of June 16, 1934, § 4, 41 U. S. C. §§ 28–33.)

A rule excluding from the Court of Claims a claim by a contractor in behalf of the subcontractor causes no inequity, since the subcontractor can protect himself by making suitable provision in the subcontract. (Cf. *Leary Construction Co.* v. *United States,* 63 C. Cls. 206; and *Penn Bridge Co.* v. *United States,* 71 C. Cls. 273; with *Severin* v. *United States,* C. Cls. No. 43421 (decided May 3, 1943), certiorari applied for,

[38] Thus, notwithstanding the reference to "any contract express or implied," jurisdiction under the Tucker Act does not extend to contracts implied in law (*Merritt* v. *United States,* 267 U. S. 338, 341; *Alabama* v. *United States,* 282 U. S. 502; *Tempel* v. *United States,* 248 U. S. 121). The Court of Claims also lacks jurisdiction to grant the usual equity decrees, and is limited to actions for money damages (*United States* v. *Jones,* 131 U. S. 1; *Leather & Leigh* v. *United States,* 61 C. Cls. 388; *Jackson* v. *United States,* 27 C. Cls. 74).

October Term, 1943, No. 223.) And, at most, the inability of the subcontractor to recover is an instance of the *damnum absque injuria* resulting from the sovereign immunity of the United States from claims upon which it has not consented to be sued. (Cf. *Schillinger* v. *United States,* 155 U. S. 163; *Yearsley* v. *Ross Construction Co.,* 309 U. S. 18.) Courts in similar cases involving private parties have encountered no difficulty in holding that a subcontractor has no right against an owner by virtue merely of the subcontract (*Baltzer* v. *Raleigh & Augusta R. R.,* 115 U. S. 634; *Peers* v. *Board of Education,* 72 Ill. 508; *Lake Erie, Wabash, & St. Louis R. R.* v. *Eckler,* 13 Ind. 67). To permit recovery in the present circumstances, as did the court below, may indeed encourage negotiations between contractor and subcontractor for the sale to the latter of the former's right of access to the Court of Claims. These considerations add the weight of policy to our contention that the court below was without jurisdiction of the claim here involved.

VI

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT MOST OF THE FINDINGS BELOW THAT THE GOVERNMENT OFFICERS ACTED ARBITRARILY AND CAPRICIOUSLY

We believe that the legal questions already discussed are dispositive of the issues raised by the

instant case. However, we feel that issue must be taken with the findings of the court below in so severely condemning many of the acts and rulings of the Government's contracting officer, superintendent, and his assistant as "arbitrary, capricious, and so grossly erroneous as to imply bad faith."

Notwithstanding our belief that they are legally irrelevant, we are reluctant to leave unchallenged these findings of the court. Since "public officials who become heads of departments and contracting officers are only rarely guilty of conduct which merits such language of condemnation" (see Judge Madden, concurring in *Bein* v. *United States,* C. Cls. No. 44619, decided December 6, 1943), the frequent use of that formula in the instant case [39] suggests that the Court of Claims did not use such a severe characterization of the conduct of these public officials in its literal sense, but merely to indicate disagreement with their decisions, using the phrase as a cliché to fit within the decisions of this Court. Cf. *Bein* v. *United States,* C. Cls. 44619 (decided December 6, 1943), concurring opinions of Judges Whitaker and Madden. That this is the case here may be inferred from the circumstance—which we discuss more

[39] The phrase "arbitrary, unreasonable, and so grossly erroneous as to imply bad faith" is used by the court some 20 times. (See R. I, 46, 47, 49, 50, 51, 59, 61, 62, 64, 76, 78, 81, 84, 85, 87, 89.)

fully hereinafter—that the condemnation in many instances lacks the "clear and compelling" evidence usually required to support such a conclusion, and from the fact that in no case did the Commissioner, who heard the witnesses and took the evidence, find that the Government's representatives had been guilty of such conduct. See Commissioner's Report, September 22, 1941, C. Cl. No. 43548. The use of that phrase to deprive the findings of the officials of finality even though they are not in fact motivated by bad faith, besides unnecessarily stigmatizing conduct of Government officials, has the vice of emasculating the protection to which this Court has held the Government entitled. See *Ripley* v. *United States*, 223 U. S. 695, 704; *Kihlberg* v. *United States*, 97 U. S. 398, 401. If the court below properly used the phrase to mean that the acts and decisions of Government officials may be disregarded where the court merely disagrees with them, or considers them unreasonable, we respectfully submit that a pronouncement from this Court itself is necessary to override the contrary principles enunciated in its prior decisions, and to clarify, for the guidance of litigants and Government officials alike, the standards by which the propriety of such findings are to be governed.

However, if the phrase means what it says, we submit that its use is in many instances unsupported by substantial evidence. The objective facts in the record, as distinguished from mere opinions—for the most part incompetent—expressed by

respondent's witnesses, clearly establish that the conduct and rulings of the Government superintendent and his assistants were, in the major instances, not arbitrary or capricious but, on the contrary, entirely reasonable, and that they were intended and reasonably adapted to secure performance by respondent of his contractual undertaking in accordance with the specifications. In many of these instances, the superintendent's sole error, if any, consisted of requiring strict adherence to the specifications. (Cf. *Ripley* v. *United States,* 223 U. S. 695, 704.)

In evaluating the correctness of the lower court's findings that the conduct and rulings of the key Government officers at the project were arbitrary, capricious, and so grossly erroneous as to imply bad faith, regard must be had for the settled rule that the evidence to support such extreme findings must be clear, convincing, and virtually enough to remove any reasonable doubt (*Choctaw & M. R. Co.* v. *Newton,* 140 Fed. 225 (C. C. A. 8), certiorari denied, 202 U. S. 620; *R. I. D.* v. *Roach,* 18 F. (2d) 755 (C. C. A. 8); cf. *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549, 553; *Chicago & Sante Fe R. R.* v. *Price,* 138 U. S. 185, 193). The condemnation of official acts in such unmitigated terms should properly be so supported, for notwithstanding that such condemnation would not in itself be accompanied by criminal or penal sanctions against the officer involved, the effect upon his career may be as drastic as criminal punishment. We are convinced that the conduct and

rulings of the Government's contracting officer, superintendent, and assistant superintendent on the instant project fall far short of meriting the language applied to them below. In view of the legal irrelevance of these findings, and the limited purpose for which we here deal with them, we shall discuss only a few:

1. *Wage Ruling Concerning Semiskilled Labor.*—The contract in question, financed from PWA funds, provided minimum wages for skilled and unskilled labor (R. I, 52). Respondent had planned to use semiskilled labor at a rate intermediate between the minimum fixed for skilled and unskilled, for placing the reinforcing steel rods and for carpentering work required in building concrete forms and scaffolding (R. I, 56). Before entering into the contract, respondent was advised by PWA that intermediate rates for semiskilled workers were contemplated, and a state labor conference had promulgated a schedule setting forth the intermediate wage rates for semiskilled labor such as carpenters, apprentices, brickmasons, etc. (R. I, 53). During the construction a dispute arose between respondent's superintendent Roberts and the Government's superintendent Feltham as to whether reinforcing steel rodmen and rough carpenters were skilled or semiskilled labor, and to settle this dispute Feltham wrote to the Department of Labor reciting the contract provision for two scales of wages

(skilled and unskilled) and inquiring whether steel rodmen were considered skilled workmen (R. I, 57–58). The Department of Labor replied that PWA had classified steel rodmen as skilled workmen (R. I, 59). Whereupon Feltham required respondent to pay all rodmen at the skilled rate (R. I, 59–60). Respondent protested against this requirement to the contracting officer who, on the basis of the letter from the Department of Labor, approved Feltham's determination (R. I, 59). The court below found that Feltham's letter to the Department of Labor failed to state the true controversy (R. I, 58); that the letter from the Department of Labor did not constitute a ruling of that Department (R. I, 59); and that the act of the contracting officer in approving Feltham's determination on the basis of the letter from the Department of Labor was "unauthorized, arbitrary and so grossly erroneous as to imply bad faith" (R. I, 59).

The mere statement of the facts discloses the error in the court's conclusion. At the outset it should be noted that nothing in the contract documents themselves provided for semiskilled labor; and that if the negotiations between respondent and PWA preceding the execution of the contract with a different agency—the Veterans' Administration—in fact became part of the contract, this was a matter for the determination, not of an engineer such as the Government super-

intendent at the site, but for the contracting officer or the head of the department aided by counsel. But even assuming that the Government superintendent incorrectly stated the problem to the Department of Labor in his request for a ruling, there was nothing to prevent the Department of Labor from replying, if it saw fit, that steel rodmen were neither skilled nor unskilled, but semiskilled. In any event, the Department of Labor certainly was at liberty to accept and approve the classification placed upon such labor by PWA itself; there is thus no basis whatever for the court's conclusion that the letter from the Department of Labor did not represent a ruling of that Department. Finally, when the contracting officer was presented with an appeal from the Government superintendent's ruling that steel rodmen fell within the category of skilled labor, he could hardly ignore the letter from the Department of Labor apparently approving PWA's classification of such labor as skilled. The reverse course could more properly have been called arbitrary—i. e., substituting his judgment for the apparent opinion of the two agencies most concerned with the question. Indeed, respondent himself relies upon communications with PWA officials and a state labor conference held pursuant to PWA instructions, to prove that semiskilled classifications were contemplated by the contract. However, the schedule of wage rates for semi-

skilled workers issued by the state labor conference made no provision for rates to be paid steel rodmen (Ex. 91) and it was only after the contract in question was completed (March 9, 1935) that the PWA classified steel rodmen as semiskilled (R. I, 56).

Similar analysis applies to the court's findings as to the Government's rulings on semiskilled carpenters, and mechanics engaged by the subcontractor for the tile and terrazzo work—items totalling more than $40,000 of the entire recovery here allowed.

2. *Outside Scaffolding.*—According to the findings of the Court of Claims, the Government's superintendent ordered respondent to use outside scaffolding to construct the brickwork, contrary to the method respondent had contemplated using, and threatened to make respondent "sorry" if he failed to comply; when respondent continued to lay bricks from the inside, the superintendent imposed arbitrary requirements as to uniformity and variation in brick and mortar spacing; whereupon respondent proceeded to erect outside scaffolding for the remaining brickwork (R. I, 44–48). These findings are apparently based upon the opinion evidence of some of respondent's witnesses, but the objective facts in the record disclose an entirely different situation: The Government's superintendent gave respondent his expert opinion that the brickwork could not be

done in accordance with the specifications unless outside scaffolding of some kind were used (R. II, 390). This did not take the form of an order, and respondent was entirely free to take or reject his advice (R. II, 390). The superintendent's remark that respondent would be sorry unless outside scaffolding was used (R. II, 131, 337) was nothing more than a prophecy that ultimately respondent would himself discover, if he disregarded that advice, that it was impossible to lay the brick in accordance with the specifications without outside scaffolding.

That the real reason for respondent's decision to use outside scaffolding had nothing whatever to do with the alleged threats and hyperexacting requirements, appears from the testimony of Phipps, respondent's own brick superintendent. This testimony shows that the change was made because respondent's superintendent informed his brick superintendent that the specifications, which the latter had admittedly "overlooked," called for a "straight edge" joint, requiring outside scaffolding, and not a "grapevine" joint, which could be obtained by the inside method of bricklaying (R. II, 338).

This testimony of respondent's own brick superintendent, which corroborates that of the Government's superintendent, shows indisputably that once Phipps' attention was called to the part of the specifications requiring the joint to be straight-

edged (Specifications, 5C–2), a requirement which he had overlooked theretofore, respondent decided that it was necessary to use outside scaffolding in order to complete the work in accordance with the specifications; and while respondent's brick superintendent thought that the required joints could be observed as well from the inside as from the outside scaffold, apparently respondent's general superintendent did not think so (R. II, 338). This is precisely the opinion expressed by the Government's superintendent to respondent's officers (R. II, 390). That this belated discovery of the specifications' requirement was the reason for the construction of the outside scaffolding is corroborated by the undisputed facts that no protests were made to the contracting officer by respondent against the suggestion of the Government's superintendent that such scaffolding be used, and that respondent did not even keep a record of the extra costs occasioned by the use of the scaffolding (R. II, 751). Such protests would certainly have been made and such record unquestionably kept if respondent had considered himself wrongly required to use outside scaffolding by the Government's superintendent.

3. *Bolting of Metal Pans.*—All the floors were of concrete beam slab construction, and the evidence shows that the laying of the concrete floor slabs took the following required course: First, steel forms called "pans" were placed in position, and

concrete was then poured into such pans. The concrete was allowed to set, after which the pans were removed. To prevent leakage of grout (wet concrete) from between the pans—which would leave ordinary sand and gravel without bearing strength—the pans must be placed so that they will overlap (R. II, 366, 367). Although new pans are very seldom bolted together where they overlap, used and warped pans must be fastened in some manner to prevent leakage of grout (R. II, 367–368). In many instances, respondent used old, worn-out pans which did not lap properly (R. II, 365, 367; Ex. D), and the grout leaked out (R. II, 368). The Government superintendent therefore required respondent to bolt these old pans in place to prevent leakage of grout (R. II, 368). The court below found that the Government's superintendent unnecessarily required respondent to bolt together the metal pans used for laying concrete floors, resulting in an excess cost of $2,620.66, and that this requirement "was unreasonable, arbitrary and so grossly erroneous as to imply bad faith" (R. I, 50). This characterization, is shown by the record to be thoroughly unjustified.

Respondent's witnesses at the hearing did not deny that the pans were old and bent, but insisted that bolting of any kind of pans was unheard of (R. II, 118) and that accordingly the Government superintendent's requirement could

be motivated only by bad faith. This was contradicted by the testimony of the Government's superintendent that the bolting of old pans was a common practice (R. II, 376–377). That the latter's testimony is the more reliable is conclusively shown by the corroboration it received in other evidence, while the testimony of respondent's witnesses to the contrary was without corroboration. Thus, pictures introduced by the Government showed unmistakably that the bolting of old pans was a common practice (Ex. I). And the manufacturer who had sold respondent the pans, although maintaining that the pans were in good shape (R. II, 705–711), admitted that in recent years he had heard of the practice of bolting pans (R. II, 710–711). Indeed, upon being shown a picture of the pans which respondent had placed on the job, the manufacturer admitted that the improper lapping shown could have resulted from the use of worn-out or warped pans (R. II, 710).

The Commissioner who heard the evidence in fact found that the requirement of bolting was reasonable under the circumstances. (Comm. Report, September 22, 1941, C. Cl. No. 43548, p. 72.) In view of the relative weight of the evidence, little can be said for the court's disregard of the Commissioner's recommended finding.

4. *Temperature Reinforcing Steel.*—The court below found that the Government superintendent arbitrarily and unauthorizedly required respondent to use temperature reinforcing steel rods in the two-way reinforced concrete slabs of a floor, as well as in the one-way reinforced concrete slabs; that the contracting officer reversed this direction of the superintendent but in the meantime respondent had incurred excess costs of $107.50 in furnishing and placing temperature steel as directed (R. I, 48, 51). These findings are likewise without substantial basis.

The specifications, as written, plainly required the placing of temperature steel rods in solid concrete floor slabs without distinction as to whether the slabs were reinforced with one-way or two-way steel rods (General note, Sheet 2–26, Ex. P). Respondent contended that temperature steel was not necessary in two-way slabs and proposed omitting such steel. The Government superintendent had no authority to permit any change in the plans and specifications, and hence required respondent either to place the temperature steel as called for by the specifications or to secure permission from the contracting officer to depart from the specifications (Letter from respondent to contracting officer dated April 21, 1934; Ex. 101). In compliance with this suggestion, respondent wrote to the contracting officer requesting such permission, and at the same time com-

plaining that the superintendent was unreasonable in this matter. The contracting officer by letter dated April 24, 1934, permitted the requested departure from the specifications as to future operations, but confirmed and agreed with the superintendent's position under the specifications—viz, that the specifications made no distinction between one-way and two-way slabs; and that neither the superintendent nor his assistant had authority to change the specifications (Ex. 101).[40] He called to respondent's attention that under the contract respondent must secure any changes in the specifications from the contracting officer in writing.[41] This ruling, which the court characterized as a "reversal" of the superintend-

[40] The contracting officer, in the letter to respondent dated April 24, 1934, stated:

"This office has impressed upon its field force, as a matter of administration, the contract requirement, that they permit no changes in the plans and specifications without prior authority from this office. Articles 2 and 3 of your contract also require that any discrepancies or changes in the drawings or in the contract should be clarified or authorized by this office in advance of action on your part.

"The note referred to on Sheet 2–26 required temperature or shrinkage rods in solid slabs without distinction as to whether the slabs are 'one-way' or 'two-way'; therefore, the Assistant Superintendent was literally following the plans and specifications in his instructions to you. However, the note was intended to apply only to 'one-way' slabs, and by carbon copy of this letter, the Superintendent in charge is being advised to omit the temperature or shrinkage steel from all 'two-way' slabs not already poured."

[41] See footnote 40, *supra*.

ent's instruction (R. I, 51), plainly affirmed it and held it to be proper and authorized by the specifications on their face.

CONCLUSION

The judgment below is erroneous and should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
VALENTINE BROOKES,
Special Assistants to the Attorney General.
MELVIN RICHTER,
Attorney.

JANUARY 1944.

APPENDIX A

The pertinent provisions of U. S. Government Form No. P. W. A. 51 ("United States Government Form of Contract") are as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions, at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the

contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. *Inspection.*—(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or

any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or

delays of subcontractors due to such causes: *Provided further,* That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be

final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows: Skilled labor, $1.10; Unskilled labor, $0.45.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates

shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics, and who are not to be termed as "unskilled laborers."

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

ARTICLE 28. *Definitions.*—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall mean the officer who signs the contract on behalf of the Government, and shall include his duly appointed successor or his duly authorized representative.

APPENDIX B

(Exhibit 46–A)

Computation of Home Office Overhead Expense allocable to Roanoke Project:

Schedule "A"—Payments Earned

	Roanoke	Other jobs	Total	Montgomery office	
				Expense	Salaries
1934					
January	$14,480.42	$68,827.36	$83,307.78	$1,108.51	$7,320.00
February	14,631.28	93,609.44	108,240.72	1,165.11	6,820.00
March	32,200.00	104,420.53	136,620.53	1,085.60	6,825.00
April	57,504.99	87,359.07	144,864.06	1,069.52	6,601.00
May	112,721.02	151,778.89	264,499.91	941.15	6,495.00
June	102,427.75	122,220.58	224,648.33	805.10	6,865.46
July	103,461.45	90,020.54	193,481.99	1,241.14	6,195.00
August	207,224.82	74,532.65	281,757.47	692.53	6,135.00
September	207,809.52	42,242.11	250,051.63	1,384.63	6,407.50
October	180,240.78	12,595.45	192,936.25	1,146.01	5,765.00
November	110,246.70	399.23	110,645.93	1,141.54	6,264.80
December	54,978.58	820.00	55,798.58	1,947.16	7,836.66
1935					
January	21,775.61	6,704.60	28,480.21	833.97	6,811.30
February to 14th	8,725.76	15,488.00	24,213.76	864.29	3,383.00
	$1,228,428.68	$871,118.45	$2,099,547.13	$18,236.26	$89,724.62
Expense					18,236.26
Salaries and expense or 5.1421% of total earnings					$107,960.88

Chargeable to Roanoke job 5.1421% of $1,228,428.68 or	$63,167.03
If completed in 10 mos. total earnings that period would have been $2,076,135.30 and total salaries and expense would have been $76,178.26 or 3.6692% of earnings. Part chargeable to Roanoke 3.6692% of $1,228,428.68 or	45,073.51
Our claim, the difference or	$18,093.52

U. S. GOVERNMENT PRINTING OFFICE: 1943